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No. 691021

IN THE

Supreme Court of the United States

ROBERT S. LADD,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

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OPINIONS BY COURTS BELOW.

Petitioner, Robert S. Ladd, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Ohio to review the judgment and decision of that court in case No. 36037, entitled Robert S. Ladd v. New York Central Railroad Company, which court, in a judgment and opinion dated April 6, 1960, reversed the Court of Appeals of Lucas County, Ohio. The opinion of the Ohio Supreme Court, appended hereto, is reported in 170 O. S. 491; the judgment of the Ohio Supreme Court reversed the judgment of Fifty Thousand Dollars ($50,000.00) and costs, of the Lucas County Common Pleas Court, theretofore ren-

dered in said cause in favor of your petitioner and against respondent herein; which said judgment of The Common Pleas Court had been affirmed by the decision of The Court of Appeals of the Sixth District of Ohio without opinion, and which judgment of reversal became final on the 6th day of April, 1960. No application for rehearing was filed in The Supreme Court of Ohio.

JURISDICTION OF THIS COURT.

The entry of the judgment of The Supreme Court of Ohio of which review is sought was dated April 6, 1960. Jurisdiction of this Court to review the said judgment of the Ohio Supreme Court by writ of certiorari is conferred upon this Court by the Act of June 25, 1948, C 646, 62 Stat. 929, Title 28 U.S.C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(3) By writ of certiorari, where the validity . . . of a statute of The United States is drawn in question . . . —or where any right, title, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. Should not Certiorari be granted to review the decision of the Supreme Court of Ohio where said court, as a basis for its decision in reversing a judgment obtained by a railroad employee against a carrier in the lower courts

of the State of Ohio, has so interpreted the provisions of the Railway Labor Act (Section 153, Title 45 U), as to require the employee, *as part of his administrative remedies*, to refer his claim by petition to the appropriate division of the National Railroad Adjustment Board where such employee has admittedly completed his administrative remedies by having his dispute handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," as required by Section 153, Title 45 (U) of the Railway Labor Act; especially where such interpretation by the Supreme Court of Ohio is in direct conflict with the decisions of the Supreme Court of the United States in Moore vs. Illinois Central, 312 U. S. 630; Slocum vs. Railroad, 329 U. S. 239, and Koppal vs. Transcontinental Air, Inc., 345 U.S. 658.

2. Should not Certiorari be granted to review the decision of the Supreme Court of Ohio where a railroad employee has been discharged and permanently disqualified by his employer carrier since January 22, 1955; where he has admittedly completed all the procedures on appeal prescribed in the bargaining agreements in effect between the carrier and the Brotherhood; where his disputed claim was "handled in the usual manner up to and including the chief operating office of the carrier designated to handle such disputes"; where the employee has accepted his disqualification by the carrier as a final discharge and termination of his employment by the carrier, and has brought a common law action against the carrier in 1956 for damages for breach of his said contracts of employment by the carrier by reason of his wrongful dismissal and permanent disqualification, not seeking reinstatement; where the em-

ployee had not worked for the carrier for a period of over 4 years before filing suit; and where the Supreme Court of Ohio has reversed a judgment in favor of the employee in the lower courts upon the sole jurisdictional ground that the employee's common law right of action for damages for his wrongful discharge is barred by reason of the employee's failure to refer his dispute by petition to the National Railway Adjustment Board instead of invoking the jurisdiction of the courts?

3. Should not Certiorari be granted to review the decision of the Supreme Court of Ohio where the discharge and permanent disqualification of a railroad employee, as charged in his petition, was caused by active fraud and deceit on the part of the Chief Medical Examiner of the carrier in the handling of the employee's appeals up to and including the chief operating officer of the carrier, as shown by the fraudulent letters of the carrier's Chief Medical Examiner to the chief operating officer of the carrier and to the highest officer of the Brotherhood, who were then jointly handling the employee's appeals, all as found by the jury by clear and convincing written evidence of such fraud and deceit; and where the Supreme Court of Ohio has failed to determine these issues of fraud upon the sole ground that it had no jurisdiction to hear and determine these issues because the employee had not exhausted his administrative remedies by referring his dispute and grievance to the Adjustment Board; although the employee had admittedly already exhausted all his administrative remedies up to and including the chief operating officer of the carrier? Is it not the Constitutional duty of all Courts, State and Federal to hear and determine such issues of

fraud and deceit where a railroad employee has fully completed all his administrative remedies required by the Railway Labor Act and by the contracts between the carrier and the Brotherhood?

STATUTES INVOLVED.

The federal statute involved in this review is the Railway Labor Act (establishing the National Railroad Adjustment Board, Title 45, Section 153(i), U.S. Code) which reads as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

STATEMENT OF FACTS.

Since plaintiff's petition is based primarily on a jurisdictional question involving the Railway Labor Act, we do not deem it necessary or proper to set forth a long statement of facts involving the merits of the case.

Plaintiff, Robert S. Ladd, was first employed by defendant, The New York Central Railroad Company, as a fireman in June, 1941. He served in the United States Navy Seabees

from the last part of 1943 until January, 1946, when he resumed the duties of his employment with the railroad. He was promoted to an engineer on January 15, 1951, but continued his work as a fireman.

He was and is a member of the Brotherhood of Locomotive Firemen and Enginemen. During his employment since 1941 it is undisputed that he was never the subject of disciplinary action by his employer, and lost no time on account of sickness prior to his wrongful discharge.

He went to work at 11:00 P.M. on December 7, 1951. About 3:00 A.M. on December 8, 1951 he had indigestion and asked to be relieved early but required no medical attention. He worked the 11:00 P.M. night shift of December 8, 1951 and regularly thereafter up to December 12, 1951. On December 12, 1951 defendant's chief medical examiner, by reason of a false history and diagnosis, caused plaintiff's wrongful and fraudulent discharge and permanent disqualification by defendant.

An administrative appeal from plaintiff's wrongful discharge and permanent disqualification by defendant was carried on by the local chairman of plaintiff's Brotherhood on behalf of plaintiff until June, 1952 and thereafter was carried on up to and including the chief operating officer of the carrier, handling such disputes, by the General Chairman of plaintiff's Brotherhood, representing plaintiff, in full compliance with the contracts between the carrier and the Brotherhood governing such appeals. Wholly because of active fraud and deceit on the part of defendant's chief medical examiner plaintiff was permanently disqualified and wrongfully discharged by the carrier. Although his permanent disqualification and wrongful and fraudu-

lent discharge by defendant occurred in September, 1952 plaintiff was not notified of the result of the handling of his appeal by the General Chairman of his Brotherhood and the Chief Operating Officer of the carrier, designated to handle such disputes, until January 22, 1955 when General Chairman Ryan, plaintiff's Brotherhood representative, notified plaintiff by letter that "our committee has exhausted its efforts in having you reinstated to service." This notice fully completed the administrative remedies available to plaintiff up to and including the chief operating officer of the carrier as required by the Railway Labor Act.

Plaintiff filed his common law action for damages for his wrongful and fraudulent discharge and permanent disqualification on January 19, 1956, in the Common Pleas Court of Lucas County, Ohio. Plaintiff's petition charged the defendant with breach of the collective bargaining agreements between the carrier and plaintiff's Brotherhood; that he accepted his wrongful and fraudulent discharge and permanent disqualification by defendant as a final discharge; and that he was no longer an employee of defendant. The defendant, in its answer and by motion, alleged that the Common Pleas Court lacked jurisdiction because plaintiff did not refer his discharge and disqualification to the National Railway Adjustment Board. The plaintiff alleged in his reply that the defendant wrongfully and fraudulently, in violation of its written contracts with plaintiff's Brotherhood, caused plaintiff to be discharged and permanently disqualified from all further service by defendant.

Upon submission of all the issues to the jury, a verdict was returned in favor of the plaintiff in the sum of

$50,000.00, and judgment was thereafter rendered thereon. On appeal by defendant, plaintiff's judgment was affirmed by the Court of Appeals of Lucas County, Ohio. No written opinion was rendered in either the trial court or the Court of Appeals. The Supreme Court of Ohio reversed the lower courts and rendered final judgment in favor of the defendant on April 6, 1960. The opinion of the Supreme Court of Ohio is set forth in 170 O.S. 491 and appended to this petition (App. A). No motion for rehearing was filed.

ARGUMENT.

QUESTIONS 1 and 2.

The Supreme Court of Ohio in its decision in the Ladd case has misinterpreted the pertinent provisions of the Railway Labor Act in attempting to justify its contention that Congress has vested *exclusive* jurisdiction in the National Adjustment Board in practically all employer-employee disputes and grievances. Section (i) of Title 45, paragraph 153, Federal Code Annotated provides as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act (June 21, 1934), *shall be handled in the usual manner up to and including the chief operating officer of the carrier* designated to handle such disputes; but, failing to reach an adjustment in this manner, the *disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full*

statement of the facts, and all supporting data bearing upon the dispute."

Sub-section (i) provides that after the dispute or grievance has been handled up to and including the chief operating officer of the carrier that in the event that an adjustment has not been reached such dispute or grievance *may* be referred by petition of either the employee or the carrier to the appropriate division of the Adjustment Board. Sub-section (i) does not say that the dispute *shall* be referred to the Adjustment Board.

We wish to call to the Court's attention pages 635 and 636, in re Moore vs. Illinois Central Railroad, 312 U.S. Reports, in which the Court states as follows:

> "It is to be noted that the section pointed out, Section 153 (i), as amended in 1934, provides no more than that disputes '*may be referred* * * * to the * * * Adjustment Board * *'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute *shall* be referred to the designated Adjustment Board by the 'parties, or by either party' * * *."

The controlling decisions by the U.S. Supreme Court on this subject are: Moore vs. Illinois Central, 312 U.S. 630; Slocum vs. Railroad Co., 320 U.S. 239; and Transcontinental Air, Inc. vs. Koppal, 345 U.S. 653. Nowhere in any of these decisions has the U.S. Supreme Court intimated that the employee is required by the provisions of the Railway Labor Act to take his case to the appropriate Adjustment Board in the event the employee and carrier fail to reach an adjustment after the dispute or grievance has been handled in the usual manner, as required by the contract

between the employee and the carrier, up to and including the chief operating officer of the carrier merely because such a proceeding was available. We submit that the Supreme Court of Ohio, in its decision in the Ladd case, has wholly misinterpreted the provisions of the Railway Labor Act and the decisions of the U.S. Supreme Court in its interpretation of those provisions.

The provisions of the contract relating to investigations and discipline are included in the Revised Schedule of Rates of Pay, Rule and Working Conditions between the Brotherhood and the defendant, as shown by plaintiff's Exhibits (Exh. 2, R. 31 to 33, incl., and Exh. 5, R. 414 to 418 incl.). The plaintiff, Mr. Ladd, was a member of both the firemen's union and the engineer's union so that all the provisions in these contracts pertaining to grievances and discipline apply to the plaintiff. Article 27 on page 36 of Exhibit No. 2 pertaining to engineers, under the heading "Investigations and Discipline provides the manner in which grievances shall be handled. Article 27, Sub-section (a) merely provides that when a member of either organization, referring to engineers and firemen's organizations, has a grievance which the local committee of his organization is unable to adjust with the local officers of the company, the matter shall be handled by the two General Chairmen, who shall work jointly in handling such grievance to its final conclusion. Also included in plaintiff's Exh. 2 under the firemen's schedule or agreement at page 75, Article 20, under the subject of "Investigations and Discipline" the contract also provides for identically the same procedure as provided in the engineer's schedule in Article 27 (a) under the same subject hereinbefore quoted. It is therefore uncontradicted by the evidence that plaintiff exhausted his

administrative remedies under the pertinent provisions of the contract pertaining to disputes and grievances. The evidence conclusively shows that plaintiff was represented in his dispute with the railroad by Mr. Johnson, Chairman of the local Grievance Committee, and later by Mr. Ryan, the General Chairman of the Brotherhood of Locomotive Engineers. Mr. Ryan testified that he had exhausted his efforts as General Chairman in attempting to solve plaintiff's dispute and grievance with the carrier as shown by his letter to Ladd to that effect on January 22, 1955.

Because of the specific provisions of the Railway Labor Act and the pertinent provisions of his employment contracts plaintiff had a perfect right to file the action in a Court of law to secure redress for his dispute and grievance against the defendant after his dispute and grievance "had been handled up to and including the chief operating officer of the carrier" as required by the Railway Labor Act.

Paragraph 3 of the syllabus in Moore vs Illinois Central, supra, at page 631 provides as follows:

> "3. The right of a workman to sue a railroad company for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act."

In its opinion in the Moore case, supra, the U.S. Supreme Court on pages 634 and 636 states as follows:

> "But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U.S.C.

Sec. 151, et seq. *But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court.*" Page 634. (Emphasis ours.)

"The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." Page 636.

In Slocum vs Railroad, 339 U.S. 239, the Supreme Court on pages 244 and 245 of its opinion reaffirms its holding in Moore vs Illinois Central, supra, and specifically holds that its former holding in Moore vs. Illinois Central, supra, is not inconsistent with its present holding in the Slocum case. The language in the opinion by the Supreme Court in the Slocum case on this point is clear and specific wherein the Court states, as follows:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U.S. 630. Moore was discharged by the railroad. *He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract.* As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. *A common law or statutory action for wrongful discharge* differs from any remedy which the Board has power to provide, *and does not involve questions of future relations between the railroad and its other employees.* If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future inter-

pretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. *The holding of the Moore case does not conflict with the decision, and no contrary inference should be drawn from any language in the Moore opinion.*" (Emphasis ours.)

The Slocum case was a dispute between two unions concerning the scope of their respective agreements. This was a jurisdictional dispute and in the Slocum case the Supreme Court has held that under the provisions of the Railway Labor Act the jurisdiction of the Adjustment Board to adjust grievances and disputes of the type involved in the Slocum case is exclusive. However, we have hereinbefore pointed out that the Supreme Court specifically held in the Slocum case that its decision in the Slocum case is not inconsistent with its former holding in the Moore case and as stated in the opinion on pages 244 and 245 definitely so holds.

The latest decision of the U.S. Supreme Court on the question of exhaustion of administrative remedies is *Transcontinental Air, Inc., vs Koppal*, 345 U.S. 653. In the Koppal case the *plaintiff made no attempt whatever to comply with the administrative remedies* prescribed in the contract between Transcontinental Air and the International Association of Machinists of which plaintiff was a member. (345 U.S. 653, 660.)

Under the law of Missouri, where the Koppal case was instituted, the law of Missouri, as shown by decisions cited by the U.S. Supreme Court, required that the plaintiff show an exhaustion of the administrative remedies provided "*under his EMPLOYMENT CONTRACT*" in order to

maintain an action in court. As pointed out in the opinion, Koppal failed to comply with *the specific administrative remedies provided in his contract of employment*. Instead he filed suit for damages for wrongful discharge without making any effort to comply with the specific mandatory administrative remedies, *provided in his* employment contract, which included in Step 3 an appeal, finally, to the National Air Transport Adjustment Board. The Ladd case therefore differs from the Koppal case in that the employment contract itself, in the Koppal case required an appeal, finally, to the National Air Transport Adjustment Board, while the employment contracts in the Ladd case provided only for an appeal up to and including the chief operating officer of the carrier. The Railroad Adjustment Board and The National Air Transport Board are similar Boards created by Congress.

Nowhere in its opinion in the Koppal case, or in the syllabus, has the U.S. Supreme Court held that compliance with administrative remedies requires anything more than the handling of plaintiff's dispute and grievance in the usual manner up to and including the chief operating officer of the carrier as required in the Railway Labor Act. Nowhere in the syllabus of the Koppal case or in the opinion does the Supreme Court say that the exhaustion of administrative remedies requires the employee, after he has taken his case to the chief operating officer of the carrier, designated to handle such disputes, to then file his petition with the appropriate division of the Adjustment Board as part of the exhaustion of his administrative remedies.

Specifically, in the Koppal case, the syllabus provided

that "the employment contract was a Missouri contract and the administrative remedies prescribed therein were consistent with the Railway Labor Act." Sub-section (b) of the syllabus in the Koppal case provides that "the employee must show that he has exhausted his administrative remedies *under his contract of employment*, if the applicable state law so requires."

Paragraph (c) of the syllabus in the Koppal case provides that "under the law of Missouri a discharged employee who brings an action against his employer for wrongful discharge must show exhaustion of administrative remedies *under his employment contract* in order to sustain his cause of action."

In the Koppal case as shown on page 662 of the opinion, the Court specifically found that the Missouri law required an employee to exhaust his administrative remedies "*under his employment contract*" and that if he failed to exhaust any of the administrative remedies, *provided for in his employment contract*, that his action would have to be dismissed. *Therefore, it is evident that in the Koppal case the Supreme Court either by inference or by specific finding has ruled that the exhaustion of administrative remedies does not require the filing of a petition by the employee with the appropriate division of the Adjustment Board after his case has been handled on appeal in the manner provided for in the employment contract* unless the employment contract *specifically* so provides.

Furthermore, in its opinion in the Koppal case, supra, the U.S. Supreme Court discusses the rights of a plaintiff who has a grievance or a dispute against a railroad in the light of its former decisions in the Moore case and Slocum

case, supra. On pages 660 and 661 of its opinion in the Koppal case the Supreme Court in discussing the Moore case and the Slocum case states as follows:

"The important point is that while the employment contract conforms to the policy of the Railway Labor Act and the Act provides a procedure for handling grievances so as to avoid litigation and interruptions of service, the *Act does not deprive an employee of his right to sue his employer for an unlawful discharge if the employee chooses to do so.*

"*We find nothing in that (Railway Labor) Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court.* ** *The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the Railroad as a prerequisite to suit for wrongful discharge.*" Moore v. Illinois Central R. Co., 312 U.S. 630 634, 636.

(Emphasis ours.)

We amplified the foregoing statement in Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 244, as follows: "*Moore (in 312 U.S. 630) was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging his as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions*

at future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

(Emphasis ours.)

"*The result is that, whereas, under the Railway Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim.* Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law."

(Emphasis ours.)

From the foregoing decisions of the U.S. Supreme Court in the Moore, Slocum, and Koppal cases from which we have quoted the pertinent controlling portions of the syllabae and opinions it is definitely established that the Railway Labor Act does not deprive an employee of his right to sue the carrier for an unlawful discharge if the employee chooses to do so. The Moore case specifically holds that Moore could have challenged the validity of his discharge before the Railway Adjustment Board, *seeking* reinstatement and back pay, if he elected so to do *after exhausting his administrative remedies provided in his contract* wth

the railroad. Instead Moore chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee of the railroad and brought suit for damages for breach of contract. In the instant case Ladd likewise chose to accept the railroad's action in discharging him and disqualifying him from future service by the railroad as a final severance of his employment by the railroad, as specifically shown by the pleadings and the evidence, thereby ceasing to be an employee of the railroad. Ladd in his petition did not seek reinstatement but merely prayed for damages for breach of contract. The only logical interpretation which can be made of the decision of the U. S. Supreme Court in the Koppal case is that where the employee does not seek reinstatement and has specifically chosen to accept his discharge and permanent disqualification from future service by the railroad as a final termination of his employment that the employee has the right to invoke the jurisdiction of the Courts to hear and determine his cause of action, where the employee has exhausted his administrative remedies up to and including the chief operating officer of the carrier, unless his employment contracts, as in the Koppal case, specifically require him to prosecute his appeal to the Adjustment Board as part of his administrative remedy. In the Koppal case the employment contract required Koppal to appeal, finally, to The National Air Transport Adjustment Board, 345 U.S. 659, 660.

The Ohio Supreme Court decision in the Ladd case is clearly in direct conflict with the holdings of the U.S. Supreme Court in the Moore, Slocum, and Koppal cases, supra

The Supreme Court of Ohio, in paragraph 1 of the syllabus, in Ladd, appellee vs. New York Central, states that:

> "The provisions of Section 153; Title 45, U.S. Code, of the Railway Labor Act (establishing the National Railroad Adjustment Board) provide a complete administrative remedy, secured by judicial review as to any money award, *under which an employee may be reinstated* and recompensed for claimed 'wrongful dismissal' by the carrier in alleged wrongful and *fraudulent* violation of a contract between the carrier and the national railway labor organization of which he is a member." (Emphasis ours.)

We submit that plaintiff did not, *and is not, seeking reinstatement*, but chose to accept the carrier's action in permanently disqualifying him from all future employment by the carrier from and after December 28, 1951, as a final discharge, thereby ceasing to be an employee of the carrier; and brought this action claiming damages for fraudulent breach of contract. The relief claimed was for money only and did not involve future employment relations with the carrier.

Paragraph 6 of plaintiff's petition states as follows:

> "Plaintiff says that his disqualification by the defendant was in direct violation of his contract of employment; that plaintiff has accepted his disqualification by the defendant as a final discharge; that he is no longer an employee of the defendant and that he is bringing this action against the defendant for breach of said contract of employment by the defendant and for wrongful dismissal and permanent disqualification from service."

Plaintiff's cause of action, as consistently shown by the pleadings, evidence and briefs, established plaintiff's

claimed status that he was no longer an employee of defendant, was seeking only a money award in damages for defendant's fraudulent breach of contract, and did not seek reinstatement. The question of reinstatement, as set forth in paragraph 1 of the syllabus in the Ohio Supreme Court's decision, was therefore not an issue in the case.

It is admitted by the railroad that after plaintiff's wrongful discharge and wrongful permanent disqualification from all future service by the carrier, he availed himself of the services of the general chairman of his brotherhood, of which he was a member, with whose assistance and representation he pursued his appeal to the chief operating officer of the carrier designated to handle such disputes. The chief operating officer of the carrier reached a final decision on plaintiff's appeal in September, 1952. However, the plaintiff was not notified of that final decision until January 22, 1955 when the general chairman of the brotherhood, authorized to handle his dispute, by letter notified him that "our committee has exhausted its efforts in having you reinstated to service."

Although it was not brought out in the evidence and is not mentioned in the briefs or the opinion of the Ohio Supreme Court, there is a time limit of six months within which disputes and grievances can be taken by petition of either of the parties to the National Railroad Adjustment Board. The agreement between the B. of L. F. & E. and the carriers, including the New York Central, dated August 11, 1948, provided in Section 17 (c) that:

> "All claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officer's decision proceedings are

instituted by the employee or his duly authorized representative * * * *." (App. B.)

Had plaintiff referred his claim by petition to the National Railroad Adjustment Board he would have been required by the foregoing agreement between the brotherhood and the carrier to institute proceedings on appeal to the Adjustment Board within six months from September 1952. Instead, he was not even notified of the final decision of the chief officer of the carrier until the general chairman of his brotherhood notified him by letter on January 22, 1955 that the brotherhood had exhausted its efforts to have him reinstated. At that time his right to appeal to the Adjustment Board was barred. Thus, under the circumstances of this particular case, plaintiff Ladd had no other available remedy than to file suit.

In *Slocum v. Railroad*, 339 U.S. 244 45, this Court states in its opinion that:

> "A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

The foregoing quotation from the Slocum case above aptly fits the facts in the Ladd case since Ladd's employment had been permanently terminated by the carrier and he had not been an employee of the carrier for a number of years; and especially since the manner in which his appeal was handled by the carrier's chief operating officer and the highest officer of the Brotherhood, handling disputes, caused any appeal to the Adjustment Board to be forever barred.

The Ohio Supreme Court in its opinion says that plaintiff Ladd had a complete and appropriate remedy by referring his petition to the Adjustment Board. It dismissed plaintiff's case and rendered final judgment on the ground that plaintiff's suit was prematurely brought without exhausting his administrative remedies, although plaintiff had admittedly exhausted all his administrative remedies provided for in the collective bargaining agreements as required by Section 153 (i) of the Railway Labor Act. The Ohio Supreme Court admitted in its opinion that plaintiff has completed the procedures prescribed in the bargaining agreement itself but says: "he did not exhaust the administrative remedy *statutorily afforded him.*"

Paragraph 2 of the syllabus, coupled with the above quotations from pages 503 and 504 of the opinion, cannot be reconciled with the Act of Congress in 1934 changing the word "shall" be referred to the Adjustment Board to "may" be referred to the Adjustment Board.

This holding of the Supreme Court of Ohio fails to follow the rulings of the U.S. Supreme Court in Moore vs. Illinois Central, 312 U.S. Reports, 630 to 636. Paragraph 3 of the syllabus in the Moore case at page 631 states as follows:

> "3. The right of a workman to sue a railroad company for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act."

On page 634 the Court further states:

> *"But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make*

an administrative finding a prerequisite to filing a suit in court." (Emphasis ours.)

The position of the Supreme Court of Ohio is in direct conflict with the decisions of the U.S. Supreme Court in Moore vs. Illinois Central, supra; and Slocum vs. Railroad, supra; and Koppal vs. Transcontinental, supra; and of the Act of Congress of 1934 changing the words "shall" be referred to the Adjustment Board to "may" be referred to the Adjustment Board (Moore vs. Illinois Central, 312 U.S. 635, 636).

What are the remedies that an employee is required to exhaust? Are the remedies those set forth in the bargaining agreements between the carrier and the Brotherhood; or is the Railway Labor Act read into and made a part of every contract by implication? It appears that the Ohio Supreme Court is in effect rewriting the Railway Labor Act by holding that "Claims, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *SHALL* be referred by a petition of the parties or by either party to the appropriate division of the Adjustment Board"." The provisions of the Railway Labor Act as amended by Congress in 1934 is "may be referred to the Adjustment Board" and not "shall be referred." We respectfully submit that the power to amend the Railway Labor Act is with Congress rather than the Supreme Court of Ohio.

QUESTION No. 3.

Our third question involves fraud and deceit on the part of the defendant and its effect on the right of Ladd to invoke the jurisdiction of the Courts. The defendant in its

answer to plaintiff's petition sets up a "novation" defense involving an alleged arbitration agreement which states as follows.

> "(5) Defendant says that upon Plaintiff's appeal from the finding and diagnosis of Defendant's chief surgeon, it was specifically agreed by and between Plaintiff through his said bargaining agent—and Defendant, that the question of Plaintiff's physical condition and his ability to continue in Defendant's employment as a locomotive fireman or engineer, should be determined by a neutral medical doctor to be agreed upon and designated by a medical doctor representing Plaintiff and a medical doctor representing Defendant, and it was agreed by and between Plaintiff and Defendant that both would abide by, agree with, and accept the findings of said neutral medical doctor. Defendant further says that a neutral medical doctor having been so agreed upon and designated—and having examined Plaintiff — he found and pronounced him physically disqualified to continue in the service of Defendant as locomotive fireman or engineer."

The written evidence, as found by the jury, by clear and convincing evidence, established that plaintiff's Brotherhood representative and the chief operating officer of the carrier were both tricked by fraudulent letters from the carrier's chief medical examiner into believing that Dr. Hopple, plaintiff's representative on the panel of three doctors chosen to examine plaintiff, had agreed on behalf of plaintiff to accept the decision of Dr. Gurdjian, an alleged neutral doctor who for many years had been one of defendant's regular medical examiners, as finally determinative of plaintiff's ability to resume the duties of his employment when in truth and in fact, no such agreement was made. By clear and convincing written evidence fraud was

established on the part of defendant's chief medical examiner in the arbitration arrangement pleaded by the defendant. The arbitration agreement and award relied upon by the defendant was not binding upon the plaintiff because of this fraud and deceit.

The Ohio law on arbitration is set forth in Ohio Revised Statutes, Chapter 2711 entitled "Arbitration" in Sections 2711.01 to 2711.15, inclusive. Section 2711.10 entitled "Court may vacate award" provides as follows:

> "In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order vacating the award upon the application of any party to the arbitration if:
>
> (A) The award was procured by corruption, fraud, or undue means;
>
> (B) There was evident partiality or corruption on the part of the arbitrators, or any of them;
>
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> If any award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators."

The question of fraud was made a major issue in the trial court and that issue was resolved by the verdict of

the jury. The Court charged the jury as follows:

> "In this case, therefore, as to the following allegations of fraud, the burden is upon the plaintiff to prove, by clear and convincing evidence, the following factors:
>
> 1. That the medical histories and diagnoses were placed in their reports to the defendant by the examining physicians and surgeons.
>
> 2. That the medical histories and diagnoses were false.
>
> 3. That the examining physicians and surgeons knew that such medical histories and diagnoses were false.
>
> 4. That the medical histories and diagnoses were substantially material in this case, that is, that as a direct and proximate result of the medical histories and diagnoses the plaintiff was disqualified from further service with the defendant as a locomotive fireman and engineer.
>
> It is therefore, a question for you, the jury, to determine whether or not the plaintiff has proved each and every one of the foregoing factors, which would constitute fraud in this case, by the required degree of proof, known as clear and convincing evidence."

The jury found for plaintiff on all these questions of fraud. With fraud so clearly established in the conduct of the administrative procedures by defendant, and in the securing of a fraudulent arbitration award, it is indeed difficult to understand why the Ohio Supreme Court should overlook this extreme case of fraud and render final judgment for the defendant on the jurisdictional grounds set forth in the syllabus and opinion.

CONCLUSION.

In conclusion we submit that the Supreme Court of Ohio by its decision in the Ladd case has clearly misinterpreted

the decisions of the U. S. Supreme Court in Moore vs Illinois Central, 312 U.S. 630, Slocum vs D. L. & W. 239, and Transcontinental Air, Inc. vs Koppal, 345 U.S. 653, by its holding that "the administrative remedy was *fully provided even though not FEDERALLY required*," and that "the plaintiff (Ladd), *having completed the procedures prescribed in the bargaining agreement itself, did not exhaust the administrative remedy STATUTORILY AFFORDED HIM.*" The gist of the decision of the Supreme Court of Ohio in the Ladd case is that because an appeal to the Railroad Adjustment Board *was available* to Ladd by filing his petition with the Adjustment Board, after admittedly exhausting his administrative remedies provided in his bargaining agreement, that it was mandatory for Ladd to appeal to the Adjustment Board, as part of his administrative remedy, even though Congress in 1934 had changed the mandatory provisions of the Railway Labor Act from "*shall*" to "*may*."

We submit that the Supreme Court of Ohio, by its *quasi* interpretation of the Railway Labor Act and the decisions of the U.S. Supreme Court, did not have the right to deny to Ladd his right to invoke the jurisdiction of the Court, after admittedly exhausting his administrative remedies up to and including the chief operating officer of the carrier, as provided in the Railway Labor Act, merely because an appeal to the Adjustment Board *might have been available* to him "even though not federally required." Such an interpretation clearly ignores the plain intendment of the Act of Congress in 1934, in changing the word "shall" to "may," and fails to follow the decisions of the U.S. Supreme Court in the Moore, Slocum, and Koppal cases, supra, interpreting the rights of a railroad employee to invoke the jurisdiction

of the courts after exhausting the administrative remedies provided in his employment contracts, up to and including the chief operating officer of the carrier.

Finally, we submit that Ladd could not perfect an appeal to the Adjustment Board by petition, "unless represented by his union" as stated by Justice Reed, in his dissenting opinion in Slocum vs Railroad, 339 U.S. 252. Ladd could not appeal to the Adjustment Board by petition unless such proceedings are instituted by the employee or his duly authorized representative within six months from the decision of the highest officer of the carrier as provided in the agreement of the Brotherhoods and the carrier on August 11, 1948 (Section 17 C..of agreement). The Supreme Court of Ohio in its opinion (170 O.S. 501), states that "the general chairman wrote to plaintiff (Ladd) in 1955, (January 22, 1955) that our committee has exhausted its efforts in having you reinstated to service." Ladd's petition was filed in the Common Pleas Court of Lucas County, Ohio on January 19, 1956 so that obviously he could not have personally filed a petition with the Adjustment Board on that date had he elected so to do.

Furthermore, as we have argued at length, the administrative appeals carried on by the chief operating officer of the carrier and the general chairman of the Brotherhood failed to bring to a final conclusion Ladd's dispute and grievance solely by reason of active fraud on the part of the carrier's chief medical examiner as found by the jury by clear and convincing evidence of such fraud.

Surely, under such circumstances, the doors of the Court should not be closed to the plaintiff Ladd because the Supreme Court of Ohio has misinterpreted the provisions of the Railway Labor Act, as amended by Congress in

1934, and as interpreted by the U.S. Supreme Court, Ladd is surely entitled to equal justice under the laws, including the right to have his cause of action determined by this Court, especially as the Supreme Court of Ohio in its opinion (170 O.S. 504) admits that Ladd had "completed the procedures prescribed in the bargaining agreement itself," and had completely exhausted his administrative remedies required by the Railway Labor Act and the contracts between the carrier and the brotherhoods.

Respectfully Submitted,

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Attorney for Petitioner

A. E. SIMMONS, *of Counsel*

APPENDIX A.

LADD, APPELLEE, *v.* THE NEW YORK CENTRAL RR. CO., APPELLANT.

Railroads—Action against interstate carrier by employee thereof—To recover damages for alleged wrongful discharge in violation of agreement—Prematurely brought, when—Failure of employee to exhaust administrative remedies—Provided by agreement and Railway Labor Act.

1. The provisions of Section 153, Title 45, U. S. Code, of the Railway Labor Act (establishing the National Railroad Adjustment Board and providing that a division of such board shall have "jurisdiction over disputes involving train- and yard-service employees of carriers"; also providing that "the disputes between an employee or group of employees and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions * * * may be referred by petition of the parties or by either party to the appropriate division of the adjustment board with a full statement of the facts * * *"; that "parties may be heard either in person, by counsel, or by other representatives"; that "a majority vote of all the members of the division of the adjustment board shall be competent to make an award with respect to any dispute submitted to it"; that "in case of an award * * * the division * * * shall make an order, directed to the carrier, to make the award effective and * * * to pay to the employee the sum to which he is entitled under the award"; that "the awards shall be final and binding upon both parties to the dispute except insofar as they shall contain a money award"; that "if a carrier does not comply with an order * * * the petitioner * * * may file in the District Court of the United States * * * a petition setting forth briefly the causes for which he claims relief and the order of the * * * adjustment board"; that "such suit * * * shall proceed in all respects as other civil suits"; and that "if the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit"), provide a complete administrative remedy, secured by judicial review as to any money award, under which an employee of a carrier may be reinstated and recompensed for claimed "wrongful dismissal" by the carrier in alleged wrongful and fraudulent violation of a contract between the carrier and the national railway labor organization of which he is a member

2. An action by an employee of an interstate railroad carrier to recover damages from the carrier for alleged wrongful discharge in violation of an agreement between the carrier and the brotherhood of which such employee is a member, which agreement covers rates of pay, rules and working conditions, and provides for methods of settlement of disputes arising thereunder, must fail as having been prematurely brought, when it is established by the evidence that such employee did not exhause the administrative remedies provided by such agreement and the Railway Labor Act.

(No. 36037 Decided April 6, 1960.)

APPEAL from the Court of Appeals for Lucas County.

Plaintiff, Robert S. Ladd, became employed by defendant, The New York Central Railroad Company, as a fireman in June 1941. He served in the United States Navy Seabees from the last part of 1943 into January 1946, when he returned to work with the railroad. He was promoted to a rating of engineer as of January 15, 1951, but continued his work as a fireman.

On the night of December 6, 1951, at about 11 p.m., he reported for work and later, during the early morning hours of December 7, while working on an engine pulling cars from one yard to another, he became ill, necessitating his relief from duty at about 4 a.m. He did not see a doctor at that time but returned to work that night at 11 p.m. He was voluntarily off for a funeral following that night and returned to work on the night of the 10th. On the 11th he was notified that he was temperarily relieved from duty pending a physical examination. He was examined in the office of Dr. Burkholder, the New York Central surgeon in Toledo, on the morning of the 11th and by a Dr. Nickels in the office of Dr. O'Donnell, the New York Central medical director at Detroit, on the 12th of December. He was temporarily relieved from service until December 27th or 28th

when he was advised at a meeting with the road foreman of engines and the local chairman of the union that he was permanently relieved from work as a fireman on the railroad. Later, he received a letter telling him that "they had diagnosed me as an epileptic." The petition alleges that the "said C. H. O'Donnell, M. D., wrongfully and mistakenly claimed that plaintiff was an epileptic and made a diagnosis of epilepsy."

On February 25, 1952, plaintiff consulted Dr. Hopple, a neurosurgeon in Toledo, who at that time "took a complete history" and "did a complete general physical and neurological examination of him" at his office, later sending the plaintiff to a hospital for 12 days' examination in March.

Dr. Hopple's report to the local representative of the brotherhood refers to "several episodes of blacking out" during the preceding five years and his final diagnosis was "syncope [fainting] probably associated with hypoglycemia [low sugar count]."

In August 1952, by mutual agreement between Dr. O'Donnell, the chief surgeon for the railroad, and Dr. Hopple, selected by the brotherhood, Dr. Gurdjian, a neurosurgeon in Detroit, was selected as "a third neutral doctor to carry out an examination and express an opinion about the employee's ability to return to his regular work." Mr. Ryan, general chairman of the locomotive engineers for that area, testified that the procedure of having Dr. Gurdjian examine the plaintiff "went further than the rules required."

Plaintiff spent about two weeks in Grace Hospital in Detroit in September 1952 for this last examination, and the report and recommendation of Dr. Gurdjian was that plaintiff "should not work on machinery or other moving vehicles because of the possibility of injury to himself as

well as to others."

From December 1951 on there were numerous conferences between railroad and brotherhood representatives, finally reaching the stage where Mr. Peterson (Assistant General Manager for Labor Relations) was representing the railroad and Mr. Ryan, general chairman of the brotherhood, was representing the plaintiff.

Following the report of Dr. Gurdjian, Mr. Peterson, as "the chief operating officer of the carrier designated to handle such disputes" (see Section 153 (i), Title 45, U.S. Code, *infra*), disqualified plaintiff from further service as a fireman on the basis of physical disability.

In January 1956, plaintiff instituted his action against the railroad, claiming damages for alleged breach of contract. Paragraph number 6 of the petition states:

"Plaintiff says that his disqualification by the defendant was in direct violation of his contract of employment; that plaintiff has accepted his disqualification by the defendant as a final discharge; that he is no longer an employee of the defendant and that he is bringing this action against the defendant for breach of said contract of employment by the defendant and for wrongful dismissal and permanent disqualification from service."

Plaintiff then alleges loss of earnings up to the time of filing suit in the amount of $20,000 and future wage impairment and loss of earnings in the sum of approximately $105,000.

The answer of the railroad, filed in January 1957, admits and denies certain pleadings of plaintiff and sets up rule 9 of the agreement between the brotherhood and the railroad. In plaintiff's reply filed in September 1957, the full set of rules, regulations and requirements between the

brotherhood and the railroad governing physical examinations are set forth and attached as part of the reply. The plaintiff alleges in his reply that defendant railroad wrongfully and fraudulently violated these rules, regulations and requirements, causing plaintiff, "to be wrongfully discharged by defendant and wrongfully disqualified from further service by defendant as set forth in plaintiff's petition."

Upon submission of all the issues to the jury, a lump sum verdict was returned in the amount of $50,000, for which judgment was rendered, and upon appeal the judgment was affirmed by a divided court. No written opinion was rendered in either the trial court or the Court of Appeals.

The cause is now before this court upon the allowance of a motion to certify the record.

Messrs. Brady, Whitehead, Simmons, Whitehead & Hunter, for appellee.

Messrs. Doyle, Lewis & Warner, Mr. Andrew E. Anderson and *Mr. D. L. Sears*, for appellant.

HUGHES, J. This action is founded on an alleged breach of contract. It is claimed that the defendant "wrongfully and fraudulently violated" the provisions of certain rules, regulations and requirements governing the defendant and its employees, which rules constitute the collective bargaining agreement on which plaintiff is suing as a third party beneficiary. The rules relating to physical examinations are set forth in full in plaintiff's reply, among which are the following:

"Rule 4. Employees who have been disabled by reason of accident or disease which predisposes them to sudden

incapacity, or whose sight, color sense or hearing may have thereby become affected, must pass a satisfactory examination before resuming duty.

"Rule 7. An employee shall be temporarily relieved from service when well defined mental or physical impairment is indicated which incapacitates him from properly performing his duties and when such impairment can be benefited by treatment or rest, so that his economic life may be prolonged. He will be restored to service when, in the opinion of the chief surgeon, the cause of disability has been corrected or improved to such an extent as will warrant return to service.

"Rule 8. An employee shall be permanently relieved from service who has a physical or mental impairment, when after a reasonable period of medical or surgical treatment it has been determined that such impairment cannot be materially improved or corrected and he is thereby precluded from properly performing his duties.

"Rule 9. An employee who fails to qualify on examination by the company surgeon and whose condition warrants temporary or permanent retirement from the service, may be re-examined on his own time by the chief surgeon, and, if such employee desires, he may be accompanied by his local chairman and by a physician of his own selection whose fee he shall assume. The decision of the chief surgeon is final, subject only to appeal through the general committee and the operating officials, to be designated on the several railroads.

"Rule 10. When it has been finally determined that an employee is unfitted for duty in his occupation, every reasonable effort will be made to provide him with employment

which he can perform satisfactorily; otherwise, he will be subject to the provisions for retirement."

"Memorandum of agreement

"In re Rule 9 of Regulations and Requirements Governing Physical Examinations of Employees Periodically.

"A fireman who fails to qualify on examination by the chief surgeon of an operating unit of this railroad may upon request have his case considered by a committee of two, one of whom will be appointed by the general manager or other designated official, the other by the general chairman. With the advice of the chief surgeon and with due consideration in borderline cases, this committee will recommend the class of restricted service, if any, and if such service is available, in which he may be used.

"Signed at Buffalo, N. Y., this third of April, 1947 [on behalf of the brotherhoods and the railroad]."

The Railway Labor Act, Section 151, *et seq.*, Title 45, U. S. Code, is very comprehensive and by its terms is an integral part of any brotherhood agreement with a railroad. Pertinent parts, with emphasis supplied, read as follows:

Section 151a:

"The purposes of the chapter are * * * (5) *to provide for the prompt and orderly settlement of all disputes arising out of grievances* or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 152:

"First. *It shall be the duty of all carriers*, their officers, agents *and employees* to exert every reasonable effort to make and maintain agreements *concerning* rates of pay, rules, and working conditions, and *to settle all disputes*, whether arising out of the application of such agreements

or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 153:

"First. There is established a board, to be known as the 'National Railroad Adjustment Board,' * * *

"(a) That the said adjustment board shall consist of 36 members, 18 of whom shall be selected by the carriers and 18 by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 152 of this title.

* * *

"(h) The said adjustment board shall be composed of four divisions * * * as follows:

"First division: *To have jurisdiction over disputes involving train and yard service employees of carriers;* that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.' This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

* * *

"(i) *The disputes between an employee* or group of employees *and a carrier* or carriers growing out of grievances or out of the interpretation or application of agreements

concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;* but, *failing to reach an adjustment* in this manner, the *disputes may be referred* by petition of the parties or *by either party* to the appropriate division of the adjustment board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the adjustment board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the adjustment board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however* [italicized in statute], that *final awards as to any such dispute must be made by the entire division* as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the

dispute may certify that fact to the Mediation Board, which board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the adjustment board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the *awards shall be final and binding upon both parties* to the dispute, *except* insofar as they shall contain a *money award*. In case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute.

* * *

"(o) In case of an award by any division of the adjustment board in favor of petitioner, *the division* of the board *shall make an order*, directed *to the carrier, to make the award effective*, and, *if the award includes a requirement for the payment of money to pay to the employee the sum to which he is entitled* under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the adjustment board within the time limit in such order, the *petitioner*, or any person *for whose benefit such order was made*, *may file* in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a *petition setting*

forth briefly *the causes* for which he claims relief, *and the order of the division* of the adjustment board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that *on the trial of such suit the findings and order of* the division of the adjustment board *shall be prima facie evidence of the facts therein stated*, and except that the *petitioner shall not be liable for costs* in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he *shall be allowed a reasonable attorney's fee*, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the adjustment board."

From the foregoing contractural and statutory provisions, it is difficult to conceive of a more complete administrative procedure for the settlement of all grievances and disputes between the railroads and their employees.

As a general rule the decisions of this court, requiring the exhaustion of administrative remedies as a prerequisite to court action, have been applicable only to procedure before governmental bodies provided for by law. However, "the law gives to parties competent to contract the same authority to agree on the course to be pursued in the event of a breach of the contract as it does to enter the contract and if the contract provides conditions to be performed in case of a breach, the conditions must be complied with

before damages can be recovered by reason of breach." 11 Ohio Jurisprudence (2d), 470, Section 215.

The agreement between the railroad and the brotherhood provides the conditions to be performed in a series of procedural steps "up to and including the chief operating officer of the carrier" (Section 153 (i), *supra*) for the settlement of grievances as a part of the employee-railway relationship, and these provisions are supplemented by the provisions of the act establishing the Railroad Adjustment Board.

It is quite clear that the procedure provided in the "Regulations and Requirements Governing Physical Examinations of Employees" was carried through in its entirety. The record shows that, after the final decision of the chief surgeon, the procedure required was even exceeded with respect to the examination and report by Dr. Gurdjian. In fact, it discloses an "appeal through the general committee and the operating officials to be designated" (see rule 9, *supra*) to a decision by "the chief operating officer of the carrier designated to handle such disputes." (See Section 153 (i), *supra*.)

The record also shows that the brotherhood did not pursue any further appeal on behalf of plaintiff. The general chairman of the brotherhood wrote to plaintiff in 1955 that "our committee has exhausted its efforts in having you reinstated to service."

Defendant asserts that plaintiff's failure to appeal to the appropriate division of the National Railroad Adjustment Board as provided in the act constitutes failure to exhaust the administrative remedies provided. Plaintiff asserts that the action for wrongful discharge is available to him in an Ohio court, claiming that his seniority rights

had been destroyed, resulting in a breach of his contract of employment, and that he is no longer an employee, having accepted as a final discharge the disqualification by defendant for further work as a fireman. It may be noted that rule 10 refutes this last contention of plaintiff.

Plaintiff further seeks to distinguish his case from those appealable to the National Railroad Adjustment Board because he "does not seek to be restored to his former employment." This is essentially a distinction without a difference. Without the agreement between the brotherhood and the railroad the plaintiff would have had no cause of action at any time for what he called his discharge. That agreement was entered into by the brotherhood primarily for the benefit of its members and provides, in conjunction with the Railway Labor Act, for settlement of all disputes. Consequently, he is bound by it as much as the railroad. Had the plaintiff pursued his appeal to the board and succeeded he would have ultimately received full monetary compensation in back pay as well as reinstatement to his position. Where then would he have been damaged? Had the plaintiff failed in his appeal, it would have been established that the railroad complied with all the requirements of the collective bargaining agreement, and that no breach of contract was committed by it. Exhaustion of the full administrative remedy provided under the agreement and the act would have given the plaintiff all the relief to which he was entitled from an agency federally established and composed of people skilled in the interpretation of carrier-brotherhood bargaining agreements and the rules and regulations promulgated thereunder.

The case of *Moore v. Illinois Central Rd. Co.*, 312 U. S. 630, 85 L. Ed., 1089, 61 S. Ct., 754, upon which plaintiff

places much reliance was discussed by Mr. Justice Burton in the opinion of the court delivered by him in the case of *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S., 653, 97 L. Ed., 1325, 73 S. Ct., 906. He also distinguishes the case of *Slocum, Chairman, v. Delaware, Lackawanna & Western Rd. Co.*, 339 U. S., 239, 94 L. Ed., 795, 70 S. Ct., 577. At the outset of his opinion, Mr. Justice Burton said:

"This case presents two questions: (1) Whether a discharged employee of a carrier that is subject to the Railway Labor Act is precluded by that act from resorting to a state-recognized cause of action for wrongful discharge and, if not, (2) whether, in such action, he must show that he has exhausted his administrative remedies, under his contract of employment. For the reasons hereafter stated, our answer to the first question is no and to the second yes, provided the applicable state law so requires."

In the *Slocum* case, where the railroad instituted an action for a declaratory judgment in a state court, it was held that the National Railroad Adjustment Board has exclusive jurisdiction under Section 153 (i) of the Railway Labor Act to adjust the dispute between two unions, each claiming for its members certain jobs with the railroad.

Mr. Justice Burton further stated in the *Koppal* opinion:

"The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the *Slocum case*, that board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge

if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the *Moore* litigation, *supra*, under Mississippi law.

"On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so." * * *"

Thus, it is established in the *Slocum case* that, in certain fields of railroad employee-management regulations and disputes, the National Railroad Adjustment Board has exclusive jurisdiction, and that in those fields no court, state or federal, may invade its jurisdiction.

It is also established in the *Koppal case*, that, where a state requires the exhaustion of administrative remedies, the plaintiff must establish that fact before he may perfect his suit in the state court.

Ordinarily, an action in a court of this state for alleged wrongful discharge is based on an agreement between employer and employee where there are no provisions embodied in the agreement specifying procedures for settlement of disputes. However, where contractural procedures are provided (as here) in an agreement between a carrier and a brotherhood under the authority of the Railway Labor Act and containing a complete administrative remedy, it would be very incongruous not to adhere to our rule that where administrative remedies are provided they must be exhausted before an action may be perfected in court. The facts of this case may be novel but the principle is not.

It is argued that the permissive word, "may," in Section 153 (i) affords plaintiff the right to elect whether to complete his appeal administratively or to commence his action in the courts for damages for wrongful discharge. This permissive authority to appeal to the National Railroad Adjustment Board is primarily for the benefit of the employee where the dispute arises over a grievance or an interpretation of the rules and regulations. Experts in the field of railway labor-management relations were available to plaintiff. The administrative remedy was fully provided even though not federally required. The plaintiff, having completed the procedures prescribed in the bargaining agreement itself, did not exhaust the administrative remedy statutorily afforded him, so that we are not persuaded to plaintiff's contention in this respect.

Finally, it is argued that because the decision of the National Railroad Adjustment Board might be final the plaintiff has a right to elect to bring this action in the courts and thus is granted in effect an election between remedies. The rule requiring exhaustion of administrative remedies before bringing an action in this state is not limited to cases where there is no finality to the administrative order.

In the case of *Bashore v. Brown, Treas.*, 108 Ohio St., 18, 140 N. E., 489, it is stated in the opinion by Jones, J.:

"One process of law is afforded the owner of property assessed for local improvement, where there is an opportunity to be heard before the body which is to make the assessment, although the decision of that body after hearing is conclusive. *Hibbs v. Smith*, 191 U. S., 310, 24 Sup. Ct., 88, 48 L. Ed., 195.)"

In the case of *State, ex rel. Lieux, v. Village of Westlake*,

154 Ohio St., 412, 96 N. E. (2d), 414, paragraph two of the syllabus states:

"An applicant for a building permit, whose application is refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus, compelling the issuance of such permit on the ground that the ordinance as a whole is unconstitutional, without first exhausting administrative remedies provided by such ordinance if such administrative remedies might enable such applicant to secure the permit."

See, also, *State Board of Health* v. *City of Greenville*, 86 Ohio St., 1, 98 N. E., 1019, Ann. Cas. 1913D, 52.

While those cases are not directly in point here, they clearly sustain the principle, which this court has followed, that exhaustion of administrative remedies is required even though the ultimate administrative decision might be conclusive.

We conclude that the pertinent provisions of the Railway Labor Act taken in conjunction with the collective bargaining agreement between the brotherhood and the railroad here, provided a full and complete administrative remedy for the plaintiff which was not exhausted by him. This action was, therefore, prematurely brought and the petition should have been dismissed. Arriving at this conclusion, we do not find it necessary to consider the other assignments of error.

The judgment of the Court of Appeals is reversed, and final judgment is rendered for the defendant.

Judgment reversed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL and PECK, JJ., concur.

APPENDIX B.

AGREEMENT

This agreement made this 11th day of August, 1948, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western and Southeastern Carriers' Conference Committees, and the employees shown thereon and represented respectively by the BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and SWITCHMEN'S UNION OF NORTH AMERICA through their Conference Committees:

IT IS HEREBY AGREED:

. . . . . .

Section 17 — Time Limit on Claims.

All claims or grievances arising on and after November 1, 1948 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the company authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty days from the date same is filed, notify the employee or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled

accordingly, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within sixty days from receipt of notice of disallowance, and the representative of the carrier shall be notified of the rejection of his decision. Failing to comply with this provision the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances.

(c) The procedure outlined in paragraphs (a) and (b) shall govern in appeals taken to each succeeding officer. Decision by the highest officer designated to handle claims and grievances shall be final and binding unless within sixty days after written notice of the decision of said officer he is notified in writing that his decision is not accepted. All claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved. It is understood, however, that the parties may by agreement in any particular case extend the six months period herein referred to.

NO. 192

IN THE

Supreme Court of the United States

October Term 1960

ROBERT S. LADD,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Ohio will be found in Appendix A, pp. 3-46 of the Petition for Certiorari. Neither the trial court nor the Court of Appeals for the Sixth Appellate District of Ohio wrote an opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. Since the invalidity of statute is not claimed here, presumably petitioner is contending that this case qualifies as involving a title, right, privilege or immunity claimed under the statutes of the United States.

Respondent denies that any such right or immunity is

asserted and respectfully submits that this Court does not have jurisdiction to grant the writ. Nowhere in his brief does petitioner set up or claim any title, right, privilege or immunity under federal statutes or under the Constitution of the United States.

QUESTIONS PRESENTED

Although petitioner has set forth three nominally separate questions* as being presented for review, it is respectfully submitted that there is only one question presented by the petition, to-wit:

Should a writ of certiorari issue to the Supreme Court of Ohio to review a judgment declaring that a common law action for damages for a claimed wrongful discharge brought by a railroad employee against his employer was prematurely brought under Ohio law where the employee had failed to exhaust the administrative remedies provided by his collective bargaining agreement and the Railway Labor Act, 45 U.S.C. §153?

STATEMENT

This is a common law action for damages for breach of an employment contract. The contract is a collective bargaining agreement entered into between petitioner's

*Petitioner's third question is an attempt to inject the evidence of alleged fraud into this hearing. There was no finding of fraud by the jury which returned a *general verdict* only. This issue, as is true of other issues raised by the evidence, was not considered by the Supreme Court of Ohio because it held the action to have been prematurely brought under the Ohio law. The claim of fraud like all other fact issues should have been submitted to the Adjustment Board by petitioner. He doesn't require his union's approval or aid to do this. *Elgin, Joliet Ry. Co. v. Burley* (1946), 327 U.S. 661; *Tom C. Hargrove v. System Federation No. 9 et al.* (Mich. 1953), 59 N.W. 2d 278; 45 U.S.C. §153 (i). In any event this issue arising in a common law action for breach of contract is purely a local matter requiring application of Ohio law and does not require the consideration of the Supreme Court of the United States.

Petitioner's first and second questions are both contained in the single question, as above stated by respondent.

union, The Brotherhood of Locomotive Engineers, and the respondent. The gravamen of petitioner's complaint was that in violation of his seniority rights he had been disqualified from work by a wrongful diagnosis of epilepsy on the part of respondent's medical department.

Petitioner instituted this action against respondent in the Court of Common Pleas of Lucas County, Ohio, on January 19, 1956, alleging:

> "Plaintiff further states that he has fully complied with all the conditions required of him by defendant under the terms of employment between the parties as set forth in printed agreements entered into by and between the defendant and Grand International Brotherhood of Locomotive Engineers for the benefit of all its enginemen, including the plaintiff herein, and became entitled to remain an engineer in the employment of the defendant with seniority rights and benefits arising out of his employment under the provisions of said printed agreements by and between the parties."

After alleging that respondent's medical director had "wrongfully and mistakenly" diagnosed him as an epileptic and that the diagnosis was "incorrect as the defendant well knew", petitioner alleged in Paragraph 6 of his petition as follows:

> "Plaintiff says that his disqualification by the defendant was in direct violation of his contract of employment; * * * that he is bringing this action against the defendant for breach of said contract of employment * * *."

Respondent's answer admitted the petitioner's employment but denied that he had complied with all of the conditions required under the terms of the collective bargaining agreement and particularly Rule 9 thereof which provides:

"An employee who fails to qualify on examination by the company surgeon and whose condition warrants temporary or permanent retirement from the service, may be re-examined on his own time by the chief surgeon, and, if such employee desires, he may be accompanied by his local chairman and by a physician of his own selection whose fee he shall assume. The decision of the chief surgeon is final, subject only to appeal through the General Committee and the operating officials to be designated on the several railroads." (R. 4)

(R. 4)

Trial commenced before a jury on September 9, 1957. The pertinent facts were as follows:

Petitioner became employed by respondent as a locomotive fireman in 1941. On December 7, 1951, he had convulsive seizure while on duty on a diesel locomotive moving a cut of cars from one yard to another in the Toledo area. He described it as a severe attack of indigestion involving nausea and vomiting (R. 38), but the other two crewmen who were on the locomotive both testified that petitioner had had convulsions and lost consciousness. (R. 141-143, 346-350)

This seizure gave respondent immediate concern and petitioner was sent to the company's doctor in Toledo for examination on December 12, 1951. (R. 260) He was sent to Detroit on the following day to be examined by a surgeon in the respondent's chief surgeon's office. (R. 238-242, Defendant's Exhibit 12, R. 422, 423) On the basis of the separate medical reports of these two doctors, the chief surgeon disqualified petitioner from further work around moving machinery. (R. 266) Petitioner was placed on an inactive status as a physically disabled employee. (R. 179)

Petitioner consulted a neurosurgeon in Toledo who

agreed with the railroad doctors that he suffered from fainting spells but disagreed as to the cause thereof. (R. 120, 122, 134, 431, 432. Defendant's Exhibit 28) Petitioner sought the assistance of his union representatives and during early 1952 there were numerous conferences between officials of the Brotherhood of Locomotive Engineers and the respondent railroad concerning the physical condition of petitioner.

The collective bargaining agreement contained detailed provisions respecting physical disqualification of employees. (R. 10-12) It was finally agreed between the chief grievance chairman of the Brotherhood and respondent's assistant general manager to have petitioner examined by a neutral doctor, both sides to abide by the result. (R. 161-177, 212, 220) A Detroit neurosurgeon was selected and conducted an examination lasting twelve days in September, 1952. He concluded that the petitioner's fainting spells were due to epilepsy, confirming the opinion of respondent's medical staff. (R. 295-299)

The respondent's assistant general manager, who was the chief operating officer designated to hear such appeals, acted on the report of the neutral doctor and disqualified petitioner from work around moving machinery on the basis of physical disability. The Brotherhood of Locomotive Engineers accepted this decision. Petitioner made no appeal to the National Railroad Adjustment Board.

The trial resulted in a jury verdict of $50,000.00 for petitioner, which was affirmed by a divided Ohio Court of Appeals. The Ohio Supreme Court granted certiorari and after a full hearing reversed the lower courts and rendered final judgment for respondent by an unanimous decision. The Ohio Supreme Court held that under Ohio law petitioner was required to exhaust the administrative remedies provided by his collective bargaining agreement and

the Railway Labor Act, 45 U.S.C. §153 (i). (Appendix A, Petition for Writ of Certiorari and reported in 170 O.S. at p. 491)

REASON FOR DENYING WRIT

It is respectfully submitted that the writ should be denied for the reason that no federal question is involved.

ARGUMENT

The sole question presented by this writ of certiorari is whether the Railway Labor Act, 45 U.S.C. §151 et seq., as construed by this Court in *Moore v. Illinois Central Rd. Co.* (1941), 312 U.S. 630, *Slocum v. Delaware, L. & W. R. Co.* (1949), 339 U.S. 239, and *Transcontinental & Western Air, Inc. v. Koppal* (1953), 345 U.S. 653, bars the application of state law requiring a railroad employee to exhaust the administrative remedies accorded him by his collective bargaining agreement and the Railway Labor Act, 45 U.S.C. §153 (i), before seeking damages in a common law action for breach of the collective bargaining agreement.

The issue as to the necessity of exhausting administrative remedies arising as it did in a common law action for breach of contract was determinable under Ohio law where the cause of action arose and the contract was to be performed. There is no claim of right, title, privilege or immunity under federal statute or the Constitution of the United States and consequently this writ should be denied on the basis of a lack of jurisdiction under 28 U.S.C. §1257.

This statute requires that a petitioner must "specially set up or claim" such federal right, title, privilege or immunity. In the instant case just the reverse is true. Petitioner has based his cause of action solely on the common

law of Ohio applicable to contracts. He has never claimed, nor can he claim, that the Railway Labor Act or any other federal statute supports his cause of action. He cites a section of the Railway Labor Act (45 U.S.C. §153 (i)*) at p. 5 of his petition as being the federal statute involved, but (as will be argued hereinafter in this brief) this statute merely confirms what is conceded on all sides herein to be the law, to-wit: federal law does not require an employee to appeal to the Adjustment Board. Petitioner bottoms his action not on this statute but on the common law of Ohio, and it is the Ohio law that he now objects to because it requires him first to appeal to the Adjustment Board. It is incongruous for petitioner now to seek federal jurisdiction and relief after deserting the remedies provided by the Railway Labor Act and turning his back upon and repudiating them.

Aside from the question of jurisdiction the writ should be denied on the ground that the United States Supreme Court has already passed on the precise question presented* by this case and has held that the law of the state involved is controlling and that no federal question is involved. The judgment of the Ohio Supreme Court in this case constitutes a pronouncement of applicable Ohio law and does not interpret or purport to interpret federal law.

The United States Supreme Court stated at p. 662 in the hearing on the merits in the Koppal case:

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*The grant of writ of certiorari was limited in Koppal to the following two questions:

"1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

"2. Whether the decisions of this Court in Moore v. Illinois Central R. Co., 312 U.S. 630, and Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act." 344 U.S. 933.

> "On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

The Koppal case had been admitted to resolve differences of opinion concerning the effect of the Moore and Slocum cases. The Moore case, arising out of the State of Mississippi, involved an action by a railroad employee against his employer for damages for wrongful discharge. The district court rendered a judgment for plaintiff whereupon the Circuit Court of Appeals reversed on the ground that the Mississippi statute of limitations barred the action. *Illinois Central R. Co. v. Moore* (5th Cir. 1940), 112 F. (2d) 959. In so doing the Circuit Court refused to follow the previous holding of the Supreme Court of Mississippi and held that the doctrine of *Erie v. Tompkins* (1938), 304 U.S. 64, did not apply to disputes between interstate rail carriers and their employees under their collective bargaining agreements because not a "local matter". The United States Supreme Court granted certiorari and reversed* the Circuit Court of Appeals holding that the applicability of the statute of limitations was a local matter and that the Federal Courts were bound by the law of Mississippi as pronounced by the Supreme Court of that

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*Moore v. Illinois Central R. Co. (1941), 312 U.S. 630.

state. (Mississippi law did not require exhaustion of administrative remedies.)

The United States Supreme Court also stated in its opinion that the *Railway Labor Act* did *not* require an employee to exhaust the administrative remedies available to him under the Act as a prerequisite to filing a suit in court. Petitioner makes much of an amendment to the Act in 1934 which substituted "may" for "shall".* He has quoted the Moore case at p. 9 of his petition to support his contention that this change in statutory language is of significance in this case. However, the excerpt quoted by petitioner was taken out of context and failed to complete the Court's comment on the change of phraseology in the Act which was as follows at pp. 635-636:

> "This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that the petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

A railroad employee *never has been required* by federal law to appeal to the Adjustment Board as a condition precedent to filing a wrongful discharge action. Therefore, the amendment on which petitioner relies so strongly is of no importance or materiality in the instant case.

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*"be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * * *"

The Court in the Moore case did not refer to the applicability of local substantive law and it was this omission which caused a divergence of opinion as to the effect of the Moore case after the Slocum decision was announced.

Slocum v. Delaware, L. & W. R. Co., supra, was an action for declaratory judgment instituted by a railroad against two competing unions. A state court assumed jurisdiction, interpreted the collective bargaining agreements and entered judgment. The United States Supreme Court granted certiorari and reversed on the ground that an inter-union dispute over interpretation of a collective agreement with the railroad encompassed future relations of the parties as well as past and that the Railway Labor Act conferred exclusive jurisdiction over such disputes on the National Railroad Adjustment Board. The Moore case was distinguished in the following language at p. 244:

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U.S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

Despite the foregoing language a difference of opinion arose as to the effect of Moore and Slocum on the right of an individual railroad employee to bring a common law breach of contract action for wrongful discharge against the railroad, i.e., what substantive law controlled this right. The Moore case had already held that federal law was em-

bodied in the Railway Labor Act did not require exhaustion of administrative remedies; but the further question arose: Did federal law as construed in the Moore case also *preclude* state substantive law from so *requiring?* This was the controversial question which needed answering when the Koppal case arose.

Transcontinental & Western Air, Inc. v. Koppal, supra, was an action for damages for wrongful discharge instituted in a Federal District Court in Missouri. The action was one at common law for breach of a collective bargaining agreement entered into under the Railway Labor Act. The plaintiff recovered a verdict but the trial judge granted judgment notwithstanding on the ground that Missouri law required plaintiff to have first exhausted his administrative remedies. The Circuit Court of Appeals reversed on the ground that Federal substantive law rather than State substantive law controlled on this question.* *Koppal v. Transcontinental & Western Air* (1952), 199 F. (2d) 117. One judge dissented stating that in his opinion the Moore case did not sanction the application of Federal substantive law.

The Supreme Court of the United States granted certiorari to resolve this question and reversed the Circuit Court, stating at p. 654:

> "This case presents two questions: (1) whether a discharged employee of a carrier that is subject to the Railway Labor Act is precluded by that Act from resorting to a state-recognized cause of action for wrongful discharge and, if not, (2) whether, in such action he must show that he has exhausted his administrative remedies, under his contract of employment. For the reasons hereafter stated, our answer to the first question is no and to the second, yes, provided the

* and that it had already been determined in Moore that federal law did not require exhaustion of remedies.

applicable state law so requires."

At p. 661 this court further stated:

> "The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge *if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law.*" (Emphasis ours)

Thus the Koppal case answered the question raised by Moore and Slocum and made it unmistakably clear that state substantive law is determinative of the right of the railroad employee to seek damages in a common law action for damages for breach of a railroad collective bargaining agreement.

Subsequent decisions of lower courts, both federal and state, have uniformly followed this rule without equivocation or divergence of opinion.

In *Coats v. St. Louis-San Francisco Ry. Co.* (5th Cir. 1956), 230 F. (2d) 798, it is stated at p. 801:

> "The case of Transcontinental & Western Air, Inc. v. Koppal, supra, holds that the Board does not have exclusive jurisdiction over the claim of an unlawfully discharged employee if the state law provides a remedy. But in seeking relief in court, administrative remedies must be first exhausted if the state law so requires."

In *Majors v. Thompson* (5th Cir. 1956), 235 F. (2d) 449, the court held (p. 451):

> "Where required by state law, the employee seeking damages for wrongful discharge must exhaust his administrative remedies before being able to maintain an action in a Federal District Court. Transcontinental & Western Air, Inc. v. Koppal * * *."

In *Jorgenson v. Penn R. Co.* (N.J. 1958), 138 A. (2d) 24, the Supreme Court of New Jersey reviewed a wrongful discharge case instituted by a railroad employee who had not exhausted the administrative remedies afforded by his collective bargaining agreement and the Railway Labor Act. The Court granted final judgment for the railroad on the ground that New Jersey law required such exhaustion of administrative remedies stating at p. 32:

> "Accordingly, under the rule of the Koppal case, the New Jersey courts have jurisdiction to adjudicate wrongful discharge cases where an employee seeks damages, and are free to interpret the collective bargaining agreement in light of the substantive law of this State to determine whether such as (*sic*) cause of action may be maintained."

In *Payne v. Pullman Co.* (Ill. 1957), 141 N.E. (2d) 83, the Court in commenting on the Moore, Slocum and Koppal cases stated at p. 85:

> "The net effect of these cases was to define an area within which the jurisdiction of the Railway Adjustment Board was exclusive and another area within which resort could be had to the courts. When in a proper case resort is had to a state court, it becomes subject to such defenses as are lawful in that state. This includes questions such as are here involved, that is:
>
> 1. Whether plaintiff was required to exhaust the remedies provided in the agreement * * *."

Also see: *Barker v. Southern Pac. Ry. Co.* (9th Cir. 1954) 214 F. (2d) 918; *Cunningham v. Erie Rd. Co.* (2nd Cir. 1957), 266 F. (2d) 411; *Smithey v. St. Louis Southwestern Ry. Co.* (8th Cir. 1956), 237 F. (2d) 637; *Stack v. N.Y.C. Rd. Co.* (2nd Cir. 1958), 258 F. (2d) 739; *Arnold v. L. & N. Rd. Co.* (1960), 180 F. Supp. 429; *Guszkowski v. U. S. Trucking Corp.* (1958), 162 F. Supp. 847; *Henry v. U. S. Trucking Corp.* (1958), 161 F. Supp. 67; *People's v. Southern Pac. Ry. Co.* (1955), 139 F. Supp. 783; *Ringle v. Transcontinental & Western Air* (1953), 113 F. Supp. 897; *Rose v. Great Northern Ry. Co.* (1957), 151 F. Supp. 806; *Dunahoo v. Thompson* (Mo. 1956), 291 S.W. (2d) 70; *Coleman v. Delaware & Hudson Rd.* (Pa.) 42 L. R. R. M. 2775. Also see 61 A.L.R. (2d) at p. 929.

Petitioner contends that the Supreme Court of Ohio has misinterpreted the Railway Labor Act by holding that he must exhaust the administrative remedies afforded by that Act. He also asserts at p. 15 of his brief that the Koppal case holds that exhaustion of administrative remedies does not include an appeal to the Adjustment Board unless the collective agreement specifically so provides.

Petitioner is wrong on both counts.* The Supreme Court of Ohio conceded in its opinion that the Railway Labor Act as construed in the Moore case does not require an exhaustion of administrative remedies. The Court did hold, however, that such exhaustion of administrative remedies was required to sustain a common law breach of contract action *under Ohio law.* The Court stated at p. 503: (170 O.S.)

"It is also established in the Koppal case, that, where a state requires the exhaustion of adminis-tra-

*Petitioner is also wrong at p. 22 of his brief wherein he states that he had "admittedly exhausted all his administrative remedies provided for in the collective bargaining agreements * *." Respondent denied that allegation and the Ohio Supreme Court specifically held that petitioner had not exhausted the administrative remedies.

tive remedies, the plaintiff must establish that fact before he may perfect his suit in the state court.

"Ordinarily, an action in a court of this state for alleged wrongful discharge is based on an agreement between employer and employee where there are no provisions embodied in the agreement specifying procedures for settlement of disputes. However, where contractual procedures are provided (as here) in an agreement between a carrier and a brotherhood under the authority of the Railway Labor Act and containing a complete administrative remedy, it would be very incongruous not to adhere to our rule that where administrative remedies are provided they must be exhausted before an action may be perfected in court. The facts of this case may be novel but the principle is not.

"* * * * The administrative remedy was fully provided even though not federally required. The plaintiff, having completed the procedures prescribed in the bargaining agreement itself, did not exhaust the administrative remedy statutorily afforded him, so that we are not persuaded to plaintiff's contention in this respect."

The Koppal case leaves this question to the state law involved and in no way limits the jurisdiction of the state courts in determining whether exhaustion of administrative remedies is required or in determining what acts shall constitute such exhaustion.

The Ohio Supreme Court held that the collective bargaining agreement involved herein when read in conjunction with the Railway Labor Act provided a complete system of arbitrament for employee grievances which petitioner had to follow under Ohio law as a condition precedent to filing suit. The Ohio Court was construing the Railway Labor Act solely for the purpose of determining what administrative remedies were available to petitioner under

his contract of employment. In so holding the Ohio Supreme Court was adopting a philosophy which the United States Supreme Court expressed in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 80 S. Ct. 1347, announced June 20, 1960.

Petitioner now in the Supreme Court of the United States seeks for the first time to inject an extraneous consideration never previously mentioned in the lower courts, namely, a portion of a 1948 collective bargaining agreement respecting time limit on claims in Appendix B of his petition. This agreement was not in the evidence, is not in the Record, and was never mentioned in the courts below (as petitioner concedes at p. 20 of his petition).

Since Appendix B has been introduced into this case for the first time at this level, it is not entitled to any consideration. However, it is submitted that it has no bearing on the issues involved in this Court in any event. The applicability of the time limit specified therein is determinable solely under Ohio law. Furthermore, it will be noted that this six month's time limit would have been applicable to this action as well as an appeal to the Adjustment Board so that if available as a bar to the Adjustment Board appeal it would have been equally available as a bar to this suit.*

CONCLUSION

It is respectfully submitted that the United States Supreme Court has no jurisdiction to review this case inasmuch as petitioner has not asserted any right, title, privilege or immunity under Federal statute or constitution, as is required by 28 U.S.C. §1257 (3).

*Petitioner did not file this action until one year after he was finally notified that he would not be reinstated. See page 7 of his petition.

The petition should also be denied for failure of petitioner to bring himself within Rule 19 of the United States Supreme Court. No federal question is involved in the judgment of the Supreme Court of Ohio, which is sought to be reviewed here. That court was merely enunciating the law of Ohio pertaining to the necessity of exhausting administrative remedies as a condition precedent to a common law action for damages for breach of an Ohio employment contract.

Respectfully submitted,

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